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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 555

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Petitioner
(Defendant-Appellant),

vs.

HERLIHY MID-CONTINENT COMPANY,
Respondent
(Plaintiff-Appellee).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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MAY IT PLEASE THE COURT:

Northern Indiana Public Service Company, an Indiana corporation, a public utility, by its counsel, respectfully represents to this Honorable Court as follows:

(a) The Court of Appeals' opinion is officially reported in:

Herlihy Mid-Continent Company v. *Northern Indiana Public Service Company*, 7th Cir., 1957, 245 F. 2d 440,

and is appended hereto at pages 21 to 28. The United States District Court (Northern District of Indiana,

Hammond Division) did not render an opinion. The findings of fact, conclusions of law and decree of the District Court appear at pages 328 through 334 of the transcript filed in accordance with Rule 21(3) and are appended hereto at pages 29 to 35.

(b) The grounds on which the jurisdiction of this Court is invoked are concisely stated as follows:

(i) The Court of Appeals' opinion was entered on June 21, 1957.

(ii) On July 23, 1957, the Court of Appeals denied petitioner's rehearing petition which had been filed within the time allowed by the Rules of the Court of Appeals. The order denying the petition for rehearing is appended hereto at page 36.

(iii) The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are contained in 28 U. S. C. 1254(1) and 28 U. S. C. 2101(c).

(c) The questions presented for review are:

(i) The Court of Appeals for the Seventh Circuit has sanctioned a departure so far from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of the power of supervision of the Supreme Court of the United States.

Over petitioner's objection, the trial court admitted contracts of the respondent with third parties into evidence. The contracts were offered for the purpose of showing that a third party had paid the respondent's Indiana Gross Income Tax on construction projects to which the petitioner was a stranger. The sole question in the trial court was whether petitioner, by contract, assumed liability for the Indiana Gross Income Tax for which respondent was liable by an Indiana statute. The Court of

Appeals held this ruling by the trial court to be error, but declined to reverse the judgment even though the trial court made a material finding of fact relying on said contracts when there was no other evidence in the record to support such finding. It is an unprecedented and startling doctrine to decide that a party has no redress where it suffers an adverse judgment based on erroneously admitted evidence.

(ii) The Court of Appeals for the Seventh Circuit has decided important state questions in a way in conflict with the applicable state law of Indiana.

First. The decision below construing the Indiana Gross Income Tax as a sort of privilege tax in the nature of an occupation or sales tax is in irreconcilable conflict with decisions of the Supreme Court of Indiana approved by this Court, which clearly show that the Indiana Gross Income Tax is not a tax upon work performed, but is a tax upon income received without regard to the source thereof.

Second. The Court of Appeals, in direct conflict with an applicable decision of the Indiana Supreme Court, holds that on cost plus construction contracts executed and performed in the State of Indiana, responsibility for payment of the Indiana Gross Income Tax was shifted to the petitioner as costs.

Third. The Court of Appeals overruled one of its own decisions, *sub silentio*, and applicable Indiana decisions to allow shifting of a tax from the statutory taxpayer (respondent) without an express contractual agreement to so shift the tax in question.

(d) This case involves the following statutes:

(i) "State laws as rules of decision. Laws of the several states, except where the Constitution or treaties of the United States or acts of Congress other-

wise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944, 28 U. S. C. 1652."

(ii) "64-2602—Levy of tax—Date.—There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided. Acts 1933, ch. 50, § 2, p. 388; 1937, ch. 117, § 2, p. 604." (Burns Ind. Stat., Sec. 64-2602).

(iii) "(g) With respect to that part of the gross income of every person which is received from any source not enumerated in subsections (a) to (f) inclusive, of this section, including, but not in limitation of the foregoing, gross income from professional services, personal eservices, or services of any character whatsoever, sales of real estate, rentals, all funds received for the performance of contracts, all funds received from the investment of capital, all receipts from retail sales and all receipts received from any source whatsoever, the tax shall be equal to one (1) per cent of such part of the gross income. The term 'retail sales' shall mean any sale of any property not included within the definitions of 'wholesale sales' and 'selling at retail'." Acts 1933, ch. 50, § 3, p. 388; 1937, ch. 117, § 3, p. 604; 1941, ch. 140, § 2, p. 418; 1945, ch. 310, § 1, p. 1380. (Burns Ind. Stat., Sec. 64-2603.)

(e) A concise statement of the case and basis for federal jurisdiction in the court of first instance.

Petitioner, Northern Indiana Public Service Company, an Indiana corporation, defendant in the District Court, entered into several construction contracts with Herlihy Mid-Continent Company, an Illinois corporation, plaintiff in the District Court, under which respondent was to build a generating station for the petitioner in Indiana. The contracts were executed and performed in Indiana. The respondent claims that it has paid Gross Income Tax to the State of Indiana and filed a complaint on four of the contracts alleging a breach of the same for failure and refusal of petitioner to pay the said tax assessed against respondent. The District Court found in favor of respondent on three of the contracts (one claim having been abandoned) and entered judgment for the respondent and against the petitioner in the sum of $31,529.55. The Court of Appeals affirmed the decision adverse to petitioner.

On August 13, 1948, the parties entered into a contract identified as K-814 for the erection and construction of an electric generating station at Michigan City, Indiana (Transcript 10-29). It was a "fixed fee" contract and provided for payment of the net cost of the work plus a fixed fee and a fixed equipment rental (Transcript 14). The net cost was described in Section 15. Such section is as follows:

> "15. It is mutually agreed that the net cost of the work shall include all expenses incurred by the contractor which are directly chargeable to the work and that said net cost of the work shall, without restricting the generality of the foregoing, include the following items:
>
> . . . . .
>
> (h) amounts required by any federal, state or local taxes applicable to the work, including old age benefit and unemployment taxes." (Transcript 15-16.)

On October 19, 1948, the parties entered into a further written contract identified as K-825 (Transcript 29-41). This contract was similar to K-814 in provisions as to payment. It also provided payment for amounts required by any federal, state or local taxes applicable to the work, including old age benefit and unemployment taxes (Transcript 31). Under this contract the parties executed Extra Order No. 1 providing for additional work but the payment was as specified in the main contract (Transcript 41).

On October 27, 1948, the parties entered into a further written contract identified as K-851 (Transcript 42-47). This contract was different in its provisions than the other two and it contained as Clause 9 the following:

> "Purchaser, in consideration of the undertakings and guarantees of Contractor and of the faithful accomplishment of the work, agrees to pay to Contractor an amount (subject to adjustment as provided for under Clause 13, and as set forth on page 2 of Contractor's Summary of Proposal (Exhibit 'C')), to be computed on the basis of the following prices for unloading and erection:
>
> | | |
> |---|---|
> | Structural members | $0.035 per pound |
> | Coal bunkers | $0.080 per pound |
> | Riveted steel stacks | $0.080 per pound |
> | Bracing members | $0.035 per pound |
> | Column baseplates | $0.035 per pound |
>
> The amount to be paid to Contractor for the material to be erected hereunder is estimated by the Consulting Engineers to be Seventy-nine Thousand One Hundred Fifty Dollars ($79,150.00)." (Transcript 46.)

and had this additional provision:

> "3. 'Cost Plus' basis on which Bidder will perform extra work on old steel authorized by Purchaser and not covered by the unit prices. This should be based on the cost of labor, material, taxes and insurance;

plus a percentage, which percentage shall include general superintendent, field office overhead, main office overhead, use of hand tools and profit. Percentage (as defined herein) is 37½%." (Transcript 44.)

On November 18, 1948, a further contract was entered into between the parties providing for the driving of sheet piling at "cost plus 4%" (Transcript 48-50). Although sued on in the complaint the respondent abandoned claims to recovery under that contract (Transcript 75).

The first work on the entire project was performed under contract K-814. On September 30, 1948, the respondent sent its first invoice under such contract (Transcript 171). This set forth the amounts for labor, material and other charges and did not include any Indiana Gross Income Tax. This invoice was paid. On October 30th, November 16th and November 30th, 1948, the next three invoices were forwarded. Each of these invoices had an item or charge for Indiana Gross Income Tax. The invoice of November 16, 1948, had an item for the Indiana Gross Income Tax which had been omitted from the invoice of September 30, 1948 (Transcript 172). Then a telephone conversation occurred relative to the Indiana Gross Income Tax between F. J. Herlihy, the president of the respondent company, and Arthur Hartman, of the petitioner's purchasing department (Transcript 172). This led to a meeting in the office of the defendant at Gary, Indiana, on December 28, 1948 (Transcript 180). At this meeting F. J. Herlihy, president of the respondent, and Hartman and Lindeman, for the petitioner, were present. In this meeting Hartman told Herlihy that "This tax is a tax upon you as a penalty for doing business in the State of Indiana." (Transcript 181-182.) Herlihy replied: "I know what the Indiana Gross Income Tax is. Strike it off of the bills. We will not bill you for it." (Transcript 182.) After the close of the meeting but on the same day

Hartman forwarded to Lawyer & Anderson, General Counsel for the petitioner company, a letter confirming the result of the meeting (Transcript 182-184). The petitioner deleted the charge for Indiana Gross Income Tax from these three invoices and then paid the amount of such invoices to the respondent minus the tax. The first billing after such meeting was December 31, 1948, and this invoice did not include any charge for Indiana Gross Income Tax (Transcript 185).

After the Gary meeting on December 28, 1948, the respondent submitted nineteen further invoices under contract K-814. None of them had any charge for Indiana Gross Income Tax. Such invoices were paid by the petitioner to the respondent (Transcript 186-188).

Under contract K-851 the first invoice was submitted by the respondent under date of August 5, 1949 (Transcript 188). This invoice contained a charge for Indiana Gross Income Tax which was eliminated from the invoice by the respondent's own Chief Clerk, John K. Cooper (Transcript 135, 188-190). Seventeen separate invoices were later submitted under this contract, the first on August 5, 1949, and the last on November 30, 1950. In none of the invoices under this contract, except the first under date of August 5, 1949, as heretofore described, did the respondent bill for the Indiana Gross Income Tax (Transcript 190-191).

Under contract K-825, forty-two invoices were submitted, the first on March 1, 1949, and the last on April 17, 1952. None contained a charge for the Indiana Gross Income Tax (Transcript 191).

On Extra Order No. 1 under contract K-825, thirty-six invoices were sent to petitioner, the first on July 22, 1949, and the last on February 14, 1952. Not one contained a charge for the tax in question (Transcript 191).

Petitioner did not pay any Gross Income Tax under any of the contracts in question. Petitioner did pay all of the invoices as submitted without any Indiana Gross Income Tax billing (Transcript 192).

Twenty-three months after the conference of December 28, 1948, and commencing on November 30, 1950, the respondent submitted separate invoices in which the only item billed was the Indiana Gross Income Tax (Transcript 240). These invoices, solely for the Indiana Gross Income Tax, were not processed as the other invoices were processed. They were sent directly to the petitioner (Transcript 148, 219). They were not sent to Sargent & Lundy, Project Engineers; were not approved for payment; and were not paid (Transcript 202). A conversation regarding those separate billings was had between Herlihy, President of the respondent company, and Arthur J. Hartman, Assistant Purchasing Agent of the petitioner company, on or about March 15, 1952, when Herlihy inquired: "What are you going to do about the Income Tax"? and Hartman said, "Well, Mr. Herlihy, you agreed there would be no Income Tax," to which Herlihy replied: "That's right, but something has come up and I have changed my mind" (Transcript 213).

Contract K-814 provided that the petitioner was to retain a certain percentage of the amount paid for the work until the work was fully completed and accepted (Transcript 17). On May 11, 1950, the petitioner released the retained percentage on that contract (Transcript 207) and in submitting its invoice under that contract the respondent also submitted a waiver of mechanic's lien for all work done thereunder. No Indiana Gross Income Tax appears on that invoice (Transcript 207). The withholding features of the Indiana Gross Income Tax were avoided by respondent's filing of an affidavit within the meaning of Section 17 E of the Act (Transcript 205-206).

Over petitioner's objection respondent was allowed to prove and introduce in evidence certain contracts it had made in 1943 with one Chicago District Electric Generating Company; the respondent was paid the Indiana Gross Income Tax by said third party (Transcript 79-88; Plaintiff's Exhibits 1-11, both inclusive). The respondent was also allowed to prove its overhead in four (4) states (Transcript 123), and profit and loss (Transcript 131), all over petitioner's objections.

The respondent paid the Indiana Gross Income Tax on all of the moneys it received under contracts K-814, K-825, Extra Order to K-825, and K-851, from the year 1948 to the end of the year 1951 (Transcript 120). The payments to the State of Indiana were made quarterly (Transcript 160). The record is silent as to the amount of Income Tax paid the State of Indiana.

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Northern District of Indiana, was diversity of citizenship, 28 U. S. C. 1332.

ARGUMENT.

1. The Court of Appeals has sanctioned a departure by the District Court which is so far from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States.

The judgment against petitioner for $31,529.55 is based upon the *theory that* the Indiana Gross Income Tax "is "applicable to the work" under contracts between the parties. This is in direct conflict with decisions of the Supreme Court of Indiana holding that the Indiana Gross Income Tax is a direct tax upon the contractor's income and not an operating cost.

In determining the litigation adversely to petitioner, the trial court relied on certain contracts of the respondent with Chicago District Electric Generating Corporation. Pursuant to Rule 12(4) and Rule 21(1), the original copy of those contracts, marked Plaintiff's Exhibits 1 and 2, and certain estimates and billing thereon marked Plaintiff's Exhibits 3, 4, 5, 6, 7 and 8, are presently in the custody of the Clerk. Those contracts were made in 1943, five years before the transactions in issue were commenced. They were admitted in evidence, over petitioner's vigorous objection, to show that Chicago District Electric Generating Corporation paid respondent the Indiana Gross Income Tax due the State of Indiana from respondent when respondent built a generating station for the Chicago District Electric Generating Corporation. A careful search of the record will fail to disclose a scintilla of evidence that petitioner had any notice of knowledge of either the execution or existence of respondent's contracts with the Chicago District Electric Generating Corporation. It has been unchallenged throughout this litigation that petitioner is a stranger to those contracts.

The most obvious nature of the error is demonstrated by the decision in *City of Chicago* v. *Greer* (1870), 76 U. S. 726, 19 L. Ed. 769. There the plaintiff was the seller of certain fire hose to the defendant city under a written contract. The city refused to accept delivery and judgment was entered for the plaintiff on his suit for breach of contract. The city, seller, complained of the refusal of the Circuit Court of the United States for the District of Northern Illinois to allow in evidence its agreements with other suppliers. In that case it is stated:

> "It is impossible to see how this could have had any legitimate bearing upon the questions presented by the case. If the City was liable at all to the plaintiff, clearly its liability can be measured only by the contract made with him. The extent of its obligation is not to be found in another contract made with another party." (76 U. S. at page 733, 19 L. Ed. at page 771.)

The Court of Appeals noted that these contracts of respondent with Chicago District Electric Generating Corporation were *res inter alios*, stating:

> "As to the previous contracts in which plaintiff was paid the tax as part of its costs, we think that the court was in error in allowing such evidence to be introduced, as it had no probative value in interpreting the contractual terms here at issue." (245 F. 2d at page 444; Appendix at page .)

In failing to reverse the judgment of the trial court on account of this manifest error, however, a far departure from the accepted and usual course of judicial proceedings was sanctioned. It is difficult to conceive of evidence which could be more harmful and prejudicial to the petitioner. The single issue in the case was whether petitioner was responsible, under construction contracts for the construction of a generating station in Indiana, to reimburse the respondent contractor for the Indiana Gross Income Tax

paid by the respondent. In determining that issue, erroneously admitted evidence was allowed to show that respondent had been paid the Indiana Gross Income Tax under a construction contract for the construction of a generating station in Indiana by Chicago District Electric Generating Corporation. It is, therefore, abundantly clear that the evidence went to the base of this litigation.

Petitioner respectfully submits that the very cases on which the Court of Appeals relied to affirm the judgment of the trial court show that the error committed was in fact reversible. In *Builders Steel Company* v. *C. I. R.*, 8 Cir. (1950), 179 F. 2d 377, 379, it appears that it is reversible error to make an essential finding which is supported only by incompetent evidence. The fact that this is an essential part of the rule is also clearly shown from the case of *Freightways, Inc.* v. *Stafford*, 8 Cir. (1955) 217 F. 2d 831, where it was stated:

> "It is to be presumed in an action tried to the court without a jury that only competent evidence will be considered but counsel for plaintiffs are contending that the evidence was competent and that it tends to sustain the claim of negligence on behalf of defendants. *If it was considered by the court and given any weight whatever it was error to do so.*" (Emphasis added), 217 F. 2d at p. 837.

The full import of the rule of law is that a reliance by the trial court on incompetent evidence does require a reversal. There can be no question in this case but that the trial court relied on the incompetent evidence and construed the contracts between plaintiff and defendant on the basis of plaintiff's contractual relations with strangers and that such a ruling is within the prohibitions of the very cases relied on in the opinion of the Court of Appeals (245 F. 2d at page 444, Appendix at pages 27-28). The conclusive nature of the trial court's reliance on the incompetent

evidence is shown in its own Finding of Facts and Conclusions of Law, particularly Finding of Fact No. 7, which is as follows:

> "For some time prior to the time that plaintiff made its bids to do the 'Work' provided for in the contracts involved in this action and up to the time the contracts here in question were executed between plaintiff and defendant, the plaintiff, as a contractor, was having business dealing with the aforesaid firm of Sargent & Lundy, in that plaintiff was performing construction work in the State of Indiana for Chicago District Electric Generating Corporation, which was commonly called the 'State-line' job. Sargent & Lundy were the engineers for the Chicago District Electric Generating Corporation on the 'State-line' job acting in the same capacity as they did for the defendant in the construction of the aforedescribed extension to its generating station on Lake Michigan, near Michigan City, Indiana. On this 'State-line' job the plaintiff billed for and was paid as part of its costs the Indiana Gross Income Tax on all cost work." (Transcript 331, Appendix at page 32.)

This finding of fact precludes any argument that the trial court disregarded the incompetent evidence. On the contrary, it shows the reliance of the trial court on the erroneously admitted evidence. A careful search of the record will disclose that there is no other evidence to support this finding of fact.

It is thus apparent that the Court of Appeals has sanctioned a practice allowing a trial court to rely on erroneously admitted evidence with impunity and deny the aggrieved party any redress even though the evidence so admitted is of a most prejudicial nature. Petitioner is unable to find a single reported decision in any court of the United States or any statute, regulation or rule, which gives a trial court the powers which, without precedent, have been sanctioned here.

2. The Court of Appeals for the Seventh Circuit has decided important state questions in a way in conflict with applicable state law.

The contracts in question are Indiana contracts since the work was performed in Indiana and payments made in Indiana. In addition, the Indiana Gross Income Tax is an Indiana tax assessed under an Indiana statute and confined by its terms to limits to the State of Indiana. Therefore, the law of Indiana, including the judicial construction thereof, defining the nature and extent of the tax and construction of the contracts is controlling. *Great Northern Railroad Company* v. *Sunburst Oil Refining Co.* (1932), 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360; *Coombes* v. *Getz*, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866; *Douglass* v. *The County of Pike* (1889), 101 U. S. 677, 25 L. Ed. 968.

(i) The Court of Appeals construes the Indiana Gross Income Tax as a sort of privilege tax in the nature of an occupation or sales tax. This is clearly demonstrated in the conclusion of the Court of Appeals that:

> "Therefore, 'state taxes * * * applicable to the Work * * *' quite clearly seem to have been intended by the parties to mean any state tax which was required to be borne in connection with or as a result of the performance of the entire contract. Hence, as plaintiff was required to advance the costs, which upon reimbursement were subjected to taxation under the Indiana law, we conclude that the tax was directly attributable to and in fact, a part of the work, namely, the entire performance of the contracts." (245 F. 2d at page 443, Appendix at pages 25-26.)

This construction of the Indiana Gross Income Tax is in irreconcilable conflict with the decisions in *J. D. Adams Manufacturing Company* v. *Storen* (1938), 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365; *Gross Income Tax Division* v. *Strauss* (1948), 226 Ind. 329, 79 N. E. 103; *Miles* v. *Department of Treasury* (1935), 209 Ind. 172, 199 N. E. 372.

Since the decisions in those three cases, there can be no construction of this state tax making it other than a gross income tax. The decision of the Court of Appeals fails to note that an income tax is an assessment upon the income of the person and not upon any particular property from which that income is derived. It is that failure which leads to an important unsupported misconstruction of the Indiana Gross Income Tax in conflict with controlling precedent. In *J. D. Adams Manufacturing Company* v. *Storen*, it was stated that:

> "The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of non-residents from sources within the State. Nor is it for the transaction of business since in many instances it hits the receipt of income by one who conducts no business. * * *" (304 U. S. at page 310, 58 Supreme Court at page 913, 82 L. Ed. at page 1368.)

It is, therefore, an obvious and erroneous misconstruction of the Indiana Gross Income Tax to hold, as did the Court of Appeals, that the tax is "applicable to the work" rather than a tax on the income received regardless of the source of the income.

(ii) The Court of Appeals also held that:

> "*Mann* v. *Schnarr*, 228 Ind. 654, 95 N. E. 2d 138 is not determinative of the question, for, although the contract therein provided that the contractor would be paid on a cost plus 10% basis, nevertheless the contract was general in nature and did not specifically define costs. The court concluded, therefore, that the Indiana tax constituted an overhead charge rather than an operating cost. Obviously, such a holding can have no bearing whatever on the situation, as we have already shown that the parties, by the terms of their contracts, included the tax within the scope of operating costs." (245 F. 2d at page 444, Appendix at page 26.)

To say that the case is rendered inapplicable because costs were not defined in the contract in that case, is to state a distinction without a difference. Certainly the terms of a contract between private parties cannot change the nature of a tax passed by a state legislature nor the construction of that tax made by the Supreme Court of the United States in *J. D. Adams Manufacturing Company* v. *Storen* (1938), 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, and by the Supreme Court of Indiana in *Miles* v. *Department of Treasury* (1935), 209 Ind. 172, 199 N. E. 372. There is no need to speculate, theorize or construe the nature of Indiana Gross Income Tax liability on a construction contract in Indiana. The case of *Mann* v. *Schaaf* (1950), 228 Ind. 654, 95 N. E. 2d 138, expressly declares the law of Indiana to be that the Indiana Gross Income Tax is a direct tax upon the contractor and not an operating cost attributable to the work.

(iii) The Court of Appeals has ignored a well established and important rule of law that the burden of the payment of a tax is not shifted from the statutory taxpaper by contractual agreement except by express language and a clear and unmistakable intention to so shift the burden.

There was no express promise by the petitioner to pay the Indiana Gross Income Tax. A search of the record will disclose that the tax is not mentioned in any of the contracts between the parties. The only language relating to the payment of taxes is in sub-paragraph (h) of clause 15 where the petitioner promises to pay:

> "expenses incurred by the contractor which are directly chargeable to the work * * * all amounts required by any federal, state or local taxes applicable to the work, including old age benefits and unemployment taxes." (Transcript at pages 15 and 16.)

Petitioner paid respondent's old age benefits and unemployment taxes but did not pay any of respondent's income taxes, state or federal.

Under these circumstances, the case of *Owen* v. *Fletcher Savings & Trust Building Co.* (1934), 99 Ind. App. 365, 189 N. E. 173, is controlling. In that case the lessor contended that the lessee was liable for the Federal Income Tax under the provisions of a lease written a year before the passage of the tax because of a provision that the lessee would pay the federal, state and local taxes assessed on the real estate or improvements thereon at any time during the period of the lease, or which would thereafter be assessed upon the right of the lessor to receive rentals under the lease. The lease in question was for a period of 99 years and the lessor contended that the passage of the Federal Income Tax was contemplated by the parties at the time of executing the lease and that accounted for the provision relating to the assessment of future taxes. The court affirmed a judgment for the lessee on the ground that there was no express promise by the lessee to pay for an income tax, stating:

> "The general rule is that, unless the covenants of the lease expressly provide that lessee shall pay the income tax that may be required of the lessor on the rentals received by him from the lessee, the lease will not be enlarged by reading therein an obligation on the part of the lessee to pay any part of the lessor's income tax—the principle '*expressio unius est exclusio alterius*,' applying where the lease specifically designates the taxes which the lessee is to pay." (99 Ind. App. at page 376; 187 N. E. at page 177.)

and applying that principle said:

> "Nowhere is an income tax expressly mentioned or referred to. *If the parties contemplated or intended that the lessee should pay the income tax assessed against the lessor on rent received by her under the*

lease, such a condition could and evidently would have been inserted in the lease by the use of a few simple, plain words, thereby eliminating any uncertainty. * * * To expand the meaning of the clause 'or which may be assessed upon the right of the lessor to receive the rentals hereunder during this lease' to include the payment of taxes upon the personal income of the lessor by the lessee, would require us to ignore the rules of construction which have been followed by the courts of other jurisdictions under like circumstances." (Emphasis added.) (99 Ind. App. at page 381; 189 N. E. at page 179.)

In failing to follow this precedent and rendering its decision in conflict with the Indiana law, the Court of Appeals also overruled, *sub silentio*, its decision in *Illinois Central* v. *Indianapolis Union P. Co.*, 7 Cir., 1925, 6 F. 2d 830. There a lessee had paid lessor's income tax from 1910 until filing a suit in 1921, and the Court of Appeals reversed a judgment adverse to the lessee on the principle that unless a contract *expressly* provides for the shifting of a tax the burden is not shifted. That principle is now overruled by silence even though it is in accord with the applicable Indiana rule.

There is not a single case cited in the opinion of the Court of Appeals which would justify a departure from the long standing rule that a tax is not shifted from the person upon whom it is placed by statute except by an express agreement showing a clear and unmistakable intention to shift the tax.

The Court of Appeals for the Seventh Circuit having sanctioned so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the supervisory power of the Supreme Court of the United States, and having decided important state questions in conflict with the applicable state law,

petitioner respectfully urges that a writ of certiorari issue to the Court of Appeals for the Seventh Circuit and that, upon review, the decision of the Court of Appeals be reversed.

Respectfully submitted,

JOHN C. LAWYER,
Counsel for Petitioner, Northern Indiana Public Service Company.

LAWYER, FRIEDRICH, PETRIE & TWEEDLE,
EDWIN H. FRIEDRICH,
R. STANLEY ANDERSON,
EDMUND A. SCHROER,
Of Counsel.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11922. SEPTEMBER TERM 1956, APRIL SESSION 1957.

HERLIHY MID-CONTINENT COMPANY, *Plaintiff-Appellee,*
v.
NORTHERN INDIANA PUBLIC SERVICE COMPANY, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

June 21, 1957.

Before DUFFY, *Chief Judge*, FINNEGAN and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Plaintiff sued to recover, under the terms of certain contracts, amounts exacted from and paid by it under the Indiana Gross Income Tax Law. Burns, Indiana tSats. § 64-2062, § 64-2603(g). The cause, tried by the court without a jury, resulted in judgment for plaintiff in the sum of $31,529.55.

Multiple construction contracts were consummated between the parties wherein plaintiff, a building contractor, agreed to perform certain work in connection with the construction of defendant's generating system near Michigan City, Indiana. The first contract, identified as K-814, exe-

cuted August 13, 1948, provided that the contractor would be paid for the "net cost" of the work, plus a fixed fee covering overhead and profit and a fixed equipment rental. In other words, plaintiff agreed to advance all costs, and for them it was to be reimbursed, in addition to overhead and profit. The contract defined "net cost" as follows: "It is mutually agreed that the Net Cost of the work shall include all expenses incurred by Contractor which are *directly chargeable to the work*, and that said Net Cost of the work shall, without restricting the generality of the foregoing, including the following items: * * * Amounts required by any Federal, State or local taxes *applicable to the Work*, including old age benefit and unemployment taxes. * * *" (Emphasis supplied). Thus, it is to be kept in mind that the contract specifically defines by way of example but not by way of exclusion expenses "directly chargeable to the work" in part as State taxes "applicable to the work."

On October 19, 1948, the second contract, K-825, was executed. It defined the term "net cost" in precisely the same terminology as that employed in contract K-814. The third contract, K-851, dated October 27, 1948 differed from the other two in that payment was based on firm unit prices rather than "net cost plus a fixed fee." However, it contained a cost provision, with which we are here concerned, by including in the extra work clause the following provision: "'Cost Plus' basis on which Bidder will perform extra work on old steel authorized by Purchaser and not covered by the unit prices. This should be based on the cost of labor, material, taxes and insurance; plus a percentage, which percentage shall include general superintendent, field office overhead, use of hand tools and profit * * *"

All the instruments were prepared by the engineering firm of Sargent and Lundy, employed by defendant to pre-

pare contracts, plans and specifications, and to aid in the procurement of bids. After contracts were awarded, their further duties entailed supervising construction and checking and approving invoices submitted by the contractor.

After commencement of work under contract K-814, plaintiff sent defendant several invoices. The first in point of time, that of September 30, 1948, set forth amounts claimed to be due for labor, materials and other items, but did not include a charge for the Indiana Gross Income Tax. Later, however, invoices dated October 30, 1948, November 16, 1948, and November 30, 1948, respectively, contained as an item of cost the tax applicable to moneys received by plaintiff for performance of the work. The November 16th invoice included a charge for the tax item which had been omitted from the initial September bill. After the invoices had been examined and tentatively approved by defendant they were forwarded to Sargent and Lundy, by whom they were then checked and certified for payment. After this certification, the invoices were mailed to defendant's principal office where that part of each pertaining to the tax was stricken, defendant refusing to pay it as an item of cost. As a result of the controversy as to which of the two contracting parties should ultimately bear the thrust of this item, on December 28, 1948, a meeting was held between plaintiff's president, now deceased, and two employees of defendant, as a result of which, it was decided that the demand for the tax would be stricken from the bills. Defendant contends that in the event that the terms of the contract are found to be ambiguous, this conduct of the parties should be construed as a practical construction of the terms of the contract by the parties. In the event that an interpretation favorable to plaintiff is reached, it is urged that by its action plaintiff has waived its right to reimbursement under the contract.

Subsequent to the meeting of December 28, plaintiff sent

19 invoices under contract K-814 wherein no charge was included for the tax, all of which were paid by defendant. The tax item was not included in any of the 42 invoices submitted under contract K-825. Under contract K-851 the first invoice of August 5, 1949 contained a charge for the Gross Income Tax, but it was later eliminated. Subsquent invoices under contract K-851 did not contain charges for the tax. However, on November 30, 1950, plaintiff commenced submitting separate invoices which included only charges for the tax: these were never paid by defendant. Plaintiff continued to pay the entire Indiana income tax attributable to the moneys received from defendant and it is to recover that amount that this suit was brought.

We lay aside for the moment the issues involving the alleged waiver and certain evidentiary questions, for it is first necessary to determine whether the construction placed upon them by the trial court can be sustained. The court found: "The State of Indiana Gross Income Taxes in the total amount of $31,529.55 which the plaintiff paid on moneys received from the defendant as net costs for expenses incurred by plaintiff are state taxes applicable to the Work, and under the provisions of the contracts in question the plaintiff is entitled to payment from the defendant of such State of Indiana Gross Income taxes as part of plaintiff's net costs of the Work."

In approaching the problem, it is well to keep in mind that the parties, as a matter of contract, may shift the burden of the tax. Thus, Regulation 404, of the Gross Income Tax Division of the State of Indiana, in effect at all times pertinent to this litigation, provided: "Passing the Tax on.—Since the gross income tax Act is silent upon the matter of adding this tax to the selling price or charges, the adding of such tax to such selling price or charges must be entirely a matter of contractual agree-

ment between the buyer and the seller, and the Department will therefore neither authorize the adding of the tax nor condemn the failure so to do, and will look only to the taxpayer for the tax upon his total gross receipts. Since taxpayers are not made the agents of the State to collect gross income tax, any amount added as the tax and collected by a taxpayer must be considered as an additional price received, and will be a part of the gross receipts of a taxpayer and must be reported as taxable income." And, it is equally clear that we are dealing with a privilege tax upon the receipt of gross income as distinguished from a tax on property. See *J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307; *Gross Tax Division* v. *Strauss*, 226 Ind. 329, 79 N.E. 2d 103. Despite the verity of these statements, it becomes essential to examine with particularity the pertinent provisions of the contracts relating to the definition of costs.

As previously pointed out, the key phrase in relation to contracts K-814 and K-825 is the provision providing that defendant will reimburse plaintiff for "amounts required by any federal, state or local taxes applicable to the Work, including old age benefit and unemployment taxes." Defendant insists that the phrase "applicable to the Work" specifically limits the type of tax included and urges that the nature of this specific tax necessarily excludes it from the defined classification. We find ourselves unable to subscribe to this contention. First, it must be pointed out that "work" is defined in the contract as follows: "The term 'Work' includes such labor, methods, material, equipment, and transportation or other faciilties as may be necessary to complete the contract." Thus, the term "work" is by contractual definition a term broad in scope and meaning, connoting, we think, the entire performance of the construction contract. Therefore, "state taxes * * * applicable to the Work * * *" quite clearly seem to have been

intended by the parties to mean any state tax which was required to be borne in connection with or as a result of the performance of the entire contract. Hence, as plaintiff was required to advance the costs, which upon reimbursement were subjected to taxation under the Indiana law, we conclude that the tax was directly attributable to and, in fact, a part of the work, namely, the entire performance of the contracts. Consequently, we agree with the conclusion of the trial court not only with respect to contracts K-814 and 825, but that this was likewise the intention of the parties under the "tax" clause of the extra work provision of contract K-851.

Mann v. *Schnarr*, 228 Ind. 654, 95 N.E. 2d 138 is not determinative of the question, for, although the contract therein provided that the contractor would be paid on a cost plus 10% basis, nevertheless the contract was general in nature and did not specifically define costs. The court concluded, therefore, that the Indiana tax constituted an overhead charge rather than an operating cost. Obviously such a holding can have no bearing whatever on the situation, as we have already shown that the parties, by the terms of their contracts, included the tax within the scope of operating costs.

The next problem with which we are confronted is whether certain acts of plaintiff constituted a waiver of its right to reimbursement for taxes paid. The trial court specifically found in its findings of fact "that plaintiff never withdrew or waived its claim against defendant for the payment of such taxes." Without detailing the course of events other than as previously set forth, from an examination of the entire record, we can not say that the finding of the district court on this point is clearly erroneous. In so holding we are mindful of the admonition of Rule 52(a) of the Federal Rules of Civil Procedure that

"due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Finally, it is contended that the court committed reversible error in admitting certain evidence. The most important question in this respect revolves around evidence pertaining to contracts, invoices and related documents which disclosed that in previous analogous jobs, handled through Sargent and Lundy, the construction contractor had been paid as part of its operating costs the Indiana Gross Income Tax assessed against it. However, it is significant that these were contracts to which defendant was not a party. Further, the court received in evidence plaintiff's profit and loss on the work done under the contracts in question as well as plaintiff's general overhead for the years 1948 through 1951.

As to the previous contracts in which plaintiff was paid the tax as part of its costs, we think that the court was in error in allowing such evidence to be introduced, as it had no probative value in interpreting the contractual terms here at issue. These matters were *res inter alias*. In *Shell Petroleum Corp.* v. *Earnest*, 97 Ind. App. 483, 485, 187 N.E. 211, in referring to testimony concerning related operations and terms of employment in determining the terms of employment then at issue, the court said: "They were in no way connected with or related to the issues or questions being litigated between appellant and appellee, or to any business transactions had between them." And, as was aptly stated in *Huntington Post No. 7, etc.* v. *Arnold*, 123 Ind. App. 160, 166, 109 N.E. 2d 98, 101: "The fact that appellant made other contracts with other persons on a cost plus basis would not tend to prove that the contract with appellee was such as appellee asserts. It was appellant's privilege to make as many and as varied contracts as it could." See also, *Wacker* v. *Essex*, 67 Ind. App. 584, 119 N.E. 466.

However, it must be reemphasized that this was tried before the court and not by a jury. Consequently, on appeal, it is presumed that only competent evidence was considered as a basis for the conclusion of the court. *Trinity Universal Insurance Co.* v. *Smithwick*, 222 F. 2d 16 (CA-8); *Freightways, Inc.* v. *Stafford*, 217 F. 2d 831 (CA-8). Furthermore, as was succinctly stated in *Builders Steel Co.* v. *C.I.R.*, 179 F. 2d 377, 379 (CA-8): "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. *Thompson* v. *Carley*, 8 Cir. 140 F. 2d 656, 660; *Doering* v. *Buechler*, 8 Cir. 146 F. 2d 784, 786; *Grandin Grain and Seed Co.* v. *U.S.*, 8 Cir., 170 F. 2d 425, 427." See also *Wisconsin Hydro Elect. Co.* v. *Equitable Fire & M. Ins. Co.*, 233 F. 2d 313 (CA-8)." As we have already concluded that there was sufficient competent evidence to sustain the decision of the trial court, we hold that no reversible error was committed.

The judgment is affirmed.

THE UNITED STATES DISTRICT COURT.

Northern District of Indiana,

Hammond Division.

HERLIHY MID-CONTINENT COMPANY, an Illinois corporation,

vs.

NORTHERN INDIANA PUBLIC SERVICE COMPANY, an Indiana corporation.

No. 1446 Civil

FINDINGS OF FACT; CONCLUSIONS OF LAW AND JUDGMENT.

The above entitled cause came on regularly for trial, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

FINDINGS OF FACT.

1. The plaintiff is a corporation organized and existing under the laws of the State of Illinois, duly authorized to transact business in the State of Indiana, and is engaged in the general contracting business. The defendant is a public utility corporation organized and existing under the laws of the State of Indiana, and is engaged in the manufacture and distribution of electric power and gas. The amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars.

2. The plaintiff, Herlihy Mid-Continent Company, of Chicago, Illinois, and the defendant, Northern Indiana Public Service Company, of Hammond, Indiana, executed two written contracts, identified on their face as K-814, dated August 13, 1948, and K-825, dated October 19, 1948, whereunder the plaintiff, as a general and independent contractor, agreed for fixed fees and its net costs, to perform

and complete certain work and furnish all labor, materials, equipment, tools and supplies required therefor, in the construction of parts of the extension of the defendant's generating station on Lake Michigan, west of the harbor at Michigan City, Indiana. The plaintiff and the defendant executed a further contract, identified on its face as K-851, which is dated October 27, 1948, whereunder plaintiff, for firm fixed unit prices, agreed to unload, erect and finish structural steel for the main building of said generating station.

3. The plaintiff satisfactorily performed and accomplished all the work required under its aforesaid contracts with the defendant in accordance with the terms and provisions thereof, and the plaintiff has been paid all monies it claimed due from the defendant, except the State of Indiana Gross Income Tax, upon the monies defendant paid plaintiff as "net cost" for expenses incurred by plaintiff in the performance of the work.

4. All of the aforedescribed contracts between plaintiff and defendant were prepared and drawn by Sargent & Lundy, an engineering firm employed by the defendant as its engineers for the construction of the aforesaid extension to defendant's generating station. The contracts were thereupon submitted to the plaintiff for execution.

5. The contract identified as K-814 contains the following provision:

> "(15) It is mutually agreed that the 'Net Cost' of the WORK shall include all expenses incurred by Contractor which are directly chargeable to the WORK, and that said Net Cost of the WORK shall, without restricting the generality of the foregoing include the following items: • • •
>
> "(h) Amounts required by any Federal, State or local taxes applicable to the WORK, including old age benefits and unemployment taxes • • •".

The contract identified as K-825 contains an identical provision.

The contract identified as K-851, which is a firm unit price contract, does not contain the aforequoted provision, and plaintiff seeks no recovery for State of Indiana Gross Income Tax under Contract K-851 for the unit prices paid by dependant; but plaintiff does seek recovery for the Indiana Gross Income Tax upon monies paid plaintiff as cost for extra work done under the Extra Work provision of contract K-851. The provision of Contract K-851 providing for extra work requested by the defendant on a "Cost Plus" basis is as follows:

> " 'COST PLUS' Basis on which Bidder will perform extra work on old steel authorized by Purchaser and not covered by the unit prices. This should be based on the cost of labor, material, taxes and insurance; plus a percentage, which percentage shall include general superintendent, field office overhead, main office overhead, use of hand tools and profit. Percentage (as defined herein) is * * *."

6. After the execution of contract K-814 and the commencement by plaintiff of the work thereunder, the plaintiff sent to defendant invoices or bills, dated October 30, 1948, November 16, 1948 and November 30, 1948, respectively, for work performed by plaintiff up to such dates, each of which bills included for payment to the plaintiff as an item of its cost the State of Indiana Gross Income Tax applicable to the monies for which payment was requested by plaintiff in performing the work. Such bills, in accordance with the defendant's prescribed practice, were mailed by plaintiff to defendant at Michigan City, Indiana, the site of the work, where they were checked, and then forwarded by defendant to the office in Chicago, Illinois of Sargent & Lundy, defendant's engineers. At Sargent & Lundy's office the bills aforedescribed were

checked and then certified for payment by Sargent & Lundy. Such certification included the State of Indiana Gross Income Tax as billed by plaintiff. These bills, so certified, were then mailed by Sargent & Lundy to defendant's principal office. In the purchasing department of the defendant, that part of the afore identified bills which pertained to the State of Indiana Gross Income Tax was stricken out in pen and ink. Thereafter the plaintiff, from time to time, billed the defendant on separate vouchers or bills for the Indiana Gross Income Tax plaintiff was required to and which it did pay. Upon completion of the work under the contracts, plaintiff mailed defendant a voucher or bill summarizing all of the State of Indiana Gross Income taxes which plaintiff had been required to and did pay. The plaintiff never withdrew or waived its claim against the defendant for the payment of such taxes.

7. For some time prior to the time that plaintiff made its bids to do the "WORK" provided for in the contracts involved in this action and up to the time the contracts here in question were executed between plaintiff and defendant, the plaintiff, as a contractor, was having business dealing with the aforesaid firm of Sargent & Lundy, in that plaintiff was performing construction work in the State of Indiana for Chicago District Electric Generating Corporation, which was commonly called the "State-line" job. Sargent & Lundy were the engineers for the Chicago District Electric Generating Corporation on the "State-line" job acting in the same capacity as they did for the defendant in the construction of the aforedescribed extension of its generating station on Lake Michigan, near Michigan City, Indiana. On this "State-line" job, the plaintiff billed for and was paid as part of its costs the Indiana Gross Income Tax on all cost work.

8. Paragraph 19 of Contracts K-814 and K-825 enumerate the items of overhead which plaintiff therein agreed

to furnish without charge other than the total fixed charge provided in paragraph 14. The Indiana Gross Income Tax is not included in items of overhead specified in paragraph 19.

9. The State of Indiana Gross Income taxes which the plaintiff seeks to recover in this trial are those that plaintiff paid upon the monies the defendant paid plaintiff as the "Net Costs" of the Work. The "Net Costs" are the expenses plaintiff actually incurred in performing the Work that are directly chargeable thereto. The defendant repaid the plaintiff these expenses and the plaintiff was required to pay the State of Indiana Gross Income Tax in the amount of $31,529.55 on the monies plaintiff received from defendant in payment of such expenses.

10. At the time in question there was in full force and effect Regulation 404 of the official regulations promulgated by the Gross Income Tax Division of the State of Indiana, which regulation is as follows, to-wit:

> Reg. 404. Passing the Tax on.—Since the gross income tax Act is silent upon the matter of adding this tax to the selling price or charges, the adding of such tax to such selling price or charges must be entirely a matter of contractual agreement between the buyer and the seller, and the Department will therefore neither authorize the adding of the tax nor condemn the failure so to do, and will look only to the taxpayer for the tax upon his total gross receipts.
>
> Since taxpayers are not made the agents of the State to collect gross income tax, any amount added as the tax and collected by a taxpayer must be considered as an additional price received, and will be a part of the gross receipts of a taxpayer and must be reported as taxable income.

Conclusions of Law.

1. This Court has jurisdiction of the parties and the subject matter on the basis of diversity of citizenship.

2. If there be any doubt or uncertainty concerning the written provisions of the contracts involved in this action as to whether the State of Indiana Gross Income Tax was included within the meaning of the word "taxes" which the plaintiff was to be paid as part of the cost of the Work, the tax provisions must be construed most strongly against the defendant because the defendant, through its engineers, Sargent & Lundy, prepared the contracts and employed the words used concerning taxes.

3. The provision of paragraph 15(h) of Contracts K-814 and K-825 apply to all expenses incurred by plaintiff which were directly chargeable to the Work under those contracts and Extra Order No. 1 under Contract K-825.

4. The word "taxes" in the provision of Contract K-851 providing for payment to the plaintiff for extra work on a "Cost Plus" basis includes any taxes required to be paid by plaintiff on the monies defendant paid plaintiff as the cost of such extra work and does not include the percentage provided for and paid plaintiff for such extra work.

5. As the contracts in question provide that the defendant shall pay the expenses incurred by plaintiff that are directly chargeable to the Work, the defendant was to reimburse the plaintiff for such expenses. That construction which is most equitable should if possible be given to the disputed tax provisions of the contracts. It would be inequitable to construe the disputed tax provisions of the contracts so as to require the plaintiff to bear the obligations of the State of Indiana Gross Income Tax on monies which defendant paid plaintiff to reimburse plaintiff for expenses actually incurred in defendant's behalf.

6. The State of Indiana Gross Income taxes in the total amount of $31,529.55 which the plaintiff paid on monies received from the defendant as net costs for expenses incurred by plaintiff are State taxes applicable to the WORK, and under the provisions of the contracts in question the plaintiff is entitled to payment from the defendant of such State of Indiana Gross Income taxes as part of plaintiff's net costs of the WORK.

7. The plaintiff is entitled to judgment against the defendant in the amount of $31,529.55 and plaintiff's costs of this action.

JUDGMENT.

The above entitled action having come on for trial before this Court without a jury, the plaintiff appearing in person and by its attorneys, Nash, Ahern & McNally, and Martin J. Nally of Chicago, Illinois, and the defendant appearing in person and by its attorneys, Friedrich, Petrie and Tweedle, and Edwin H. Friedrich of Hammond, Indiana, and this Court having heard all of the evidence, testimony and proofs adduced upon the trial and having filed its Findings of Fact and Conclusions of Law with Order for judgment; Now, pursuant thereto it is hereby

ORDERED, ADJUDGED and DECREED that the plaintiff, Herlihy Mid-Continent Company, have and recover judgment against the defendant, Northern Indiana Public Service Company, in the sum of Thirty-one Thousand Five Hundred Twenty-nine Dollars and Fifty-five Cents ($31,529.55), together with costs of this action to be taxed by the Clerk of this Court.

Enter:

LUTHER M. SWYGERT,
Judge.

Hammond, Indiana.

APPENDIX.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois.

Tuesday, July 23, 1957.

Before

Hon. F. RYAN DUFFY, Chief Judge,
Hon. PHILIP J. FINNEGAN, Circuit Judge,
Hon. WALTER C. LINDLEY, Circuit Judge.

HERLIHY MID-CONTINENT COMPANY, *Plaintiff-Appellee*, vs. NORTHERN INDIANA PUBLIC SERVICE COMPANY, *Defendant-Appellant*.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 11922.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.